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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 588

LANDON A. JACKSON, *ET AL.*

Petitioners

v.

THE UNITED STATES

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

James J. Bierbower
Commonwealth Building
Washington, D. C.

Harry A. Inman
1200 17th Street, N. W.
Washington, D. C.

Counsel for Petitioners

Washington, D. C. · THIEL PRESS · 202 · 393-0625

INDEX

	Page
Opinions Below	31
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	14
Conclusion	21
Appendix A – Statutes	22
B – Opinions and Judgment Below	31
C – Conflicting Opinion	41

CITATIONS

CASES:

Adler, et al. v. United States, 134 Ct. Cl. 200	21
Aviles v. United States, 151 Ct. Cl. 1	16
Chicot County Dist. v. Bank, 308 U.S. 371	17
Duncan v. Summerfield, 251 F.2d 896	15
Gideon v. Wainwright, 372 U.S. 335	18
Griffin v. Illinois, 351 U.S. 12	18
Grisham v. Hagan, 361 U.S. 278	12, 13
Jackson v. Denno, 378 U.S. 368	18
Kinsella v. Singleton, 361 U.S. 234	13
Kinsella, Warden v. Krueger, 351 U.S. 470	10
Levy v. United States, 118 Ct. Cl. 106	16
Linkletter v. Walker, 381 U.S. 618	17
McElroy v. Guagliardo, 259 F.2d 927	21
McElroy v. United States ex rel. Guagliardo, 361 U.S. 281	12
McTiernan v. Gronouski, 337 F.2d 31	19

	Page
Mallow v. United States, 161 Ct. Cl. 207	16, 20, 21
Myers v. United States, 272 U.S. 52	14
Nicolas v. United States, 257 U.S. 71	14
Norton v. Shelby County, 118 U.S. 425	17
O'Brien v. United States, 148 Ct. Cl. 91	16
Powell v. Zuckert, 366 F.2d 634	15
Railway Conductors of America v. United States, 329 U.S. 520	21
Reid v. Covert, 354 U.S. 1	18
Shadrick v. United States, 151 Ct. Cl. 408	19
Schneider v. Rusk, 377 U.S. 163	18
U.S. Alkali Export Assn. v. United States, 325 U.S. 196	21
United States ex rel. Arent v. Lane, 249 U.S. 367	14
United States ex rel. Toth v. Quarles, 350 U.S. 11	18
Williams v. Zuckert, 372 U.S. 765	20
Wilson v. Bohlender, 361 U.S. 281	13

CONSTITUTION:

Article III, Section 2	18
Fifth Amendment	18
Sixth Amendment	18

STATUTES AND REGULATIONS:

Section 14 of the Veterans Preference Act of 1944, 5 U.S.C. 863	3, 19, 20

CIVIL SERVICE COMMISSION REGULATIONS:

5 C.F.R. 22.302(d)	3, 20
5 C.F.R. 22.401(c)	3, 20
5 C.F.R. 22.402	3, 20
5 C.F.R. 22.501(a)(b)(c)	3, 20
5 C.F.R. 22.502(b)	3, 20
5 C.F.R. 22.603	3, 20

Page

UNIFORM CODE OF MILITARY JUSTICE,
64 STAT. 108, et seq.

Article 2(11) 3, 10
Article 81 . . . . . 3, 4
Article 92 . . . . . 3, 4
Article 134 . . . . . 3, 5

DEPARTMENT OF THE ARMY
REGULATIONS:

AR 35-510, Foreign Financial Operations, Nov. 1, 1951 . . . 3, 4, 6

AR 35-510, Foreign Financial Operations, Aug. 20, 1954 . . . . . 3, 6

Army Forces Far East Circular No. 69, "Control of Beverage Sales," March 19, 1953 and No. 142, August 15, 1954 . . . . . 3, 4, 6

MISCELLANEOUS:

Davis, Kenneth Culp, *Administrative Law Treatise*, Section 20.07 21

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on March 17, 1967.

CITATION TO OPINION BELOW

The opinion of the United States Court of Claims is printed in Appendix B, infra, p. 31, and is unreported.

JURISDICTION

The judgment of the United States Court of Claims was entered on March 17, 1967. Rehearing was denied June 9, 1967. The jurisdiction of this Court is invoked under 28 USC, Section 1255(1).

QUESTIONS PRESENTED

(1) Whether a civilian employee's claim for back pay is barred by laches when the civilian was court-martialed and incarcerated but nevertheless pursued his remedies with diligence and without intent to delay.

(2) Whether Supreme Court holdings and a District Court order that the court-martial of a civilian is an unconstitutional exercise of court-martial jurisdiction should be considered retroactive in effect to void an administrative removal of a civilian based solely upon that court-martial.

(3) Whether conviction by court-martial charging a veteran preference eligible with commission of certain acts is substantial evidence to support removal by the Department of the Army as affirmed by the Civil Service Commission.

(4) Whether the removal of veteran preference eligibles by the Department of the Army and affirmed by the Civil Service Commission, incarcerated in a foreign country, is defective, arbitrary and capricious where they were denied the right to a hearing and personal appearance, the opportunity to review the evidence presented, the right to present witnesses and to confront and cross-examine opposing witnesses.

(5) Whether it is necessary to appeal to the Board of Appeals and Review of the Civil Service Commission in order to exhaust administrative remedies where petitioners were incarcerated in a foreign country.

(6) Whether petitioners are entitled to recover back pay from time of removal to date where removal was based upon a conviction subsequently held void.

(7) Whether the period of incarceration limits the amount of recovery due for back pay on the ground that the parties were not ready, willing and able to perform work.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Article III, Section 2, the Fifth Amendment, and the Sixth Amendment to the Constitution of the United States; Section 14 of the Veterans Preference Act of 1944, 5 USC 863; Civil Service Commission Regulations, 20 F.R. 2699 et seq., 5 CFR 22.302(d), 5 CFR 22.401(c), 5 CFR 22.402, 5 CFR 22.501 (a), (b), (c), 5 CFR 22.502 (b), 5 CFR 22.603; Uniform Code of Military Justice, 64 Stat. 108, Article 2(11), Article 81, Article 92, Article 134; Regulations AR 35-510, Foreign Financial Operations, November 1, 1951; AR 35-510, Foreign Financial Operations, August 20, 1954; and Army Forces Far East Circular No. 69, Control of Beverage Sales, March 19, 1953, and No. 142, August 15, 1954. They are printed in Appendix A.

STATEMENT

Petitioners Jackson, Washington, Shaw, Smith, Jenkins and Mosakowski were civilian employees of the Department of the Army in Japan. Each was a veteran preference eligible in the excepted service. On March 21, 1956 they were tried by a general court-martial in Tokyo, Japan,[1] on charges of

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[1] Military jurisdiction over civilian employees was premised upon the Uniform Code of Military Justice, 10 U.S.C. §§ 801-935 (1964). In 1956 and prior to its amendment, article 2, which defines "Persons subject to the Code," provided in part the following (ch. 169, 64 Stat. 109 (1950)):

> "(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the

conspiracy to purchase and dispose of whiskey and the acceptance of military payment certificates[2] from others than authorized personnel.[3] On March 10, 1956, they were found guilty of violating articles 81[4] and 92[5] of the Uniform Code

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main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

[2]This certificate was the designated medium of exchange for all Army personnel, civilian and military, stationed in the Far East.

[3]AR 35-510, Foreign Financial Operations, Nov. 1, 1951, 32 C.F.R. § 536.80(d) (1951), provided that use of the military payment certificate was restricted entirely to United States authorized personnel and that,

> "(d) Under no circumstances will authorized personnel or disbursing officers accept military payment certificates from, transfer military payment certificates to, or exchange military payment certificates for persons other than authorized United States personnel, or accept or exchange military payment certificates after the date designated by the Secretary of the Army * * * for their acceptance or exchange."

Like the military payment certificate, the use and disposition of alcoholic beverages was likewise restricted to United States authorized personnel. Army Forces Far East Circular No. 69, Control of Beverage Sales, Mar. 19, 1953, prohibited–

> "a. Sale, gift, barter, donation or other disposition of alcoholic beverages to any individual under 21 years of age or to persons not authorized by this directive to purchase alcoholic beverages."

[4]Article 81 of the Uniform Code of Military Justice, ch. 169, 64 Stat. 134 (1950) (now 10 U.S.C. § 881 (1964)), provided:

> "Any person subject to this code who conspires with any other person or persons to commit an offense under this code shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct."

[5]Article 92 of the Uniform Code of Military Justice, ch. 169, 64 Stat. 136 (1950) (now 10 U.S.C. § 892 (1964)), provided:

> "Any person subject to this code who–
>
> (1) violates or fails to obey any lawful general order or regulation; or

of Military Justice. Petitioner Jenkins was found guilty also of violating article 134.[6] Petitioners Jenkins and Washington were given one-year sentences and fined $1,500.00 each. Petitioners Shaw and Smith were given one-year sentences and fined $1,000.00 each. Petitioner Mosakowski was given a one-year sentence and fined $2,500.00. Petitioner Jenkins was given a two-year sentence and fined $1,000.00.[7] The sentences were approved on April 12, 1956 by the convening military authority, reviewed by an Army Board of Review and approved by it June 27, 1956. Petitioners filed petitions with the United States Court of Military Appeals, which were denied on September 21 and November 21, 1956. (R., Defendant's Exhibits 8-9)

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(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct."

[6] Art. 134 [10 U.S.C. § 934] General article.

"Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredupon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

[7] Plaintiffs Smith and Shaw were released at the expiration of their sentences (after allowance for good behavior) on December 21, 1956, and December 27, 1956, respectively. Jackson and Washington were released on November 20, 1956, and Jenkins on March 7, 1957—each having been granted a remission of his sentence on grounds of general clemency. As to Mosakowski, his failure to have paid the $2,500 fine within the period of his 1-year confinement resulted in an extension of his term—this as called for by the original sentence. However, in August 1957, upon his having paid the fine in full, he was granted parole.

Petitioners' removal proceedings were instituted immediately following their court-martial of March 10, 1956. Advance notices of their removal, containing substantially the same charges as in the court-martial proceedings,[8] were sent

[8]The notice of proposed removal sent to plaintiff Jackson was virtually identical to that received by each of the other plaintiffs and stated in pertinent part as follows:

> "In accordance with Department of the Army Civilian Personnel Regulations S1, this is to advise you that it is proposed to effect your removal for violations of Articles 81 and 92, Uniform Code of Military Justice, not less than thirty (30) days from the date of your receipt of this notice.
>
> "The specific charges set forth below are made against you in support of the above action:
>
> "From about 1 April 1954 to about 1 June 1955 you conspired with Masayasu Higuchi, Kintaro Shimane, Bunji Takemato, Susumu Iino and Teruhide Chijiwa, all Japanese Nationals, to commit the following offenses:
>
> "a. Unlawful purchase of liquor from the Colonial DAG Open Mess and the Yokohama Civilian Open Mess, in quantities in excess of maximum authorized amounts, in violation of paragraph 17a, AFFE Circular 69, and paragraph 5b, AFFE Circular 142, both Headquarters United States Army Forces, Far East, dated 19 March 1953 and 15 August 1954, respectively.
>
> b. Unlawful disposition of liquor purchased from the Camp Yokohama Locker Fund and its successors, the Colonial DAC Open Mess, and the Yokohama Civilian Open Mess to Masayasu Higuchi and Kintaro Shimane, Japanese Nationals and persons not authorized by the following circulars to purchase liquor, in violation of paragraph 19a, AFFE Circular 69 and paragraph 6a, AFFE Circular 142, both Headquarters United States Army Forces, Far East, dated 19 March 1953 and 15 August 1954, respectively.
>
> c. Unlawful acceptance of military payment certificates from Masayasu Higuchi and Kintaro Shimane, persons not authorized to possess or transfer military payment certificates, in violation of paragraph 10d, AR 35-510, dated 1 November 1951, and paragraph 16d, AR 35-510, dated 20 August 1954.

to them on March 30 and April 5, 1956.[9] [10] Petitioners were advised officially that their removals were effective on May 31, 1956[11] and June 7, 1956.[12] [13] [14]

> Specifically, you purchased unlawfully from the Camp Yokohama Locker Fund and its successors, the Colonial DAC Open Mess and the Yokohama Civilian Open Mess, about 150 cases of liquor which was a quantity in excess of the maximum authorized amount, and disposed of 140 cases of the liquor to Masayasu Higuchi and Kintaro Shimane, Japanese Nationals, not authorized to purchase liquor or possess or transfer military payment certificates, for which you received $1,200.00 in military payment certificates. The amount received was to cover the purchase price of liquor and $5.00 profit per case.
>
> For the above violations you were found guilty by a General Court Martial on 10 March 1956, and sentenced to pay a fine of one thousand five hundred dollars ($1,500.00) and to be confined at hard labor for one (1) year, and to be further confined at hard labor until said fine is paid but not more than (1) year and six (6) months in addition to the one year adjudged.
>
> You have the right to answer this notice of purposed action personally and in writing and to submit any and all evidence you may desire within ten (10) days from the date of receipt of this notice. The Civilian Personnel Section will make such pertinent regulations and records available as you require for preparation of your reply. Your answer should be forwarded through channels to Civilian Personnel Officer, Headquarters, 1st Cavalry Division, APO 201.
>
> Careful consideration will be given to the charges and to your reply, and you will be furnished a written notice of final decision.

[9] Each of the plaintiffs was given such a notice on April 5, 1956 except plaintiff Smith, who was given his advance notice of proposed removal on March 30, 1956.

[10] Plaintiffs Smith and Washington did not respond to the removal notices. The other plaintiffs responded.

[11] Plaintiffs Jackson, Jenkins and Washington.

[12] Plaintiffs Shaw, Mosakowski and Smith.

[13] The notice of removal received by plaintiff Shaw was virtually identical to the notices received by the other four plaintiffs. It stated in pertinent part as follows:

All petitioners appealed to the United States Civil Service Commission as veteran preference eligibles. Petitioner Jackson's appeal was rejected as untimely. The Commission stated, as to all others:

> Receipt is acknowledged of your letter of 13 April 1956, submitted in reply to the charges contained in the notice of proposed adverse action dated 5 April 1956.
>
> With regard to your complaint concerning various points in connection with your trial and conviction, it is not within the authority of this section, to dispute the decision of the court. While the letter to you dated 5 April 1956 was only a proposal of removal based on the decision of the court-martial board, the decision has now been sustained at the command level . . . .
>
> After careful consideration of the charges, your reply and your previous record of service, it has been determined that no evidence has been presented to change the validity of the original charges. In view of the foregoing a decision has been reached to effect your removal for willful misconduct (violation of Articles 81 and 92, Uniform Code of Military Justice), effective at the close of business 7 June 1956.
>
> You have the right to request review of this decision under the grievance procedure as provided in Civilian personnel Regulations E2 within 15 calendar days after the effective date of this action, or as a veteran preference eligible, you may elect to appeal your removal to the Chief Law Officer, United States Civil Service Commission, Washington, D. C., within 10 calendar days after the effective date of removal.

[14]The removal letter to plaintiff Smith was similar in wording to the letter to plaintiff Washington, which states in pertinent part as follows:

> You were notified by letter dated 30 March 1956 that it was proposed to remove you from your position as Procurement Clerk, GS-2025-5d, $4076.00 per annum for misconduct, resulting from your conspiring to violate regulations and for the violations of regulations. Specifically your misconduct involved the unlawful purchase and disposition of liquor and the unlawful use of Military Payment Certificates. You were notified of your rights and were given 10 days in which to reply to the specific charges set forth in the notice.

> "We have completed our investigation into your case . . . you have a right to a hearing and to appear personally or through or accompanied by a designated representative. Facilities are available for hearing in our Twelfth Regional Office with headquarters at San Francisco, California, if you can secure your release from confinement in order to attend. If you cannot secure your release for that purpose, we can adjudicate your appeal on the basis of the documents of record."

Plaintiff Washington answered in a letter dated August 29, 1956, that he could not appear because there was no provision for release from confinement for that purpose but that he would be returning to the United States in six weeks and would like to appear in person at a hearing in San Francisco, California, or Washington, D. C. The Commission answered September 6, 1956: ". . . we cannot grant your request to delay scheduling your hearing until your release from confinement or your arrival in Washington, D. C." The Commission then again offered plaintiff Washington the facilities of the Twelfth Regional Office in San Francisco or Washington D. C., for plaintiff or his representative to appear at a hearing. Plaintiff Washington answered on September 19, 1956: "Since my request cannot be granted, and I am unable to appoint a representative, it is requested the hearing proceed as scheduled."

Plaintiff Jenkins asked to appear and received no answer. Plaintiff Shaw said in a letter of September 2, 1956: "My request to appear personally for a hearing has been disapproved, because of institutional policy." (R., Defendant's Exhibit 49, p. 1)

> Your failure to reply to the notice of proposed action has resulted in the consideration of your case based on the charges set forth therein. After careful review of all available facts a decision has been reached to effect your removal effective 7 June 1956. Notification of Personnel Action, Standard Form 50 is inclosed.

The Commission affirmed the removal actions on September 18, 1956[15] and September 24, 1956.[16] The pertinent portion of the analyses of the Appeals Examining Office was as follows:

> "The Department of the Army based its charges against the appellant on alleged violations of Articles 81 and 92 of the Uniform Code of Military Justice. These two articles prescribe failure to obey an order or regulation and conspiracy to commit any offense prescribed by the Code.
>
> "In support of its charges against the appellant, the Department of the Army offered a certified copy of the verdict of the Court Martial that found Mr. Mosakowski guilty and sentenced him to one year at hard labor and a fine of $2,500., in default of the fine to serve not more than an additional two and a half years.
>
> "Under the terms of Article 2(11) of the Uniform Code of Military Justice, subject to certain treaty provisions, all persons 'serving with', 'employed by', or 'accompanying' the Armed Forces without the continental United States are subject to terms of the Uniform Code and may be tried by U. S. Military Court Martial for offenses alleged as violations of the Code.
>
> "In the case of *Kinsella, Warden v. Krueger*, 351 U.S. 470, the U. S. Supreme Court decided that the Uniform Code was operative in Japan and held that a U.S. Military Court Martial had jurisdiction to try the 'dependent wife' of a military officer as a person accompanying the Armed Forces for offenses under the Code committed by her when she was residing in Japan.
>
> "In view of this case it is apparent that as a matter of law the military court martial had jurisdiction to try Mr. Mosakowski as a person 'employed by'

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[15] Plaintiff Jenkins, Mosakowski, Shaw and Smith.

[16] Plaintiff Washington.

the Armed Forces outside the continental United States for offenses alleged to be a violation of the Uniform Code of Military Justice. His trial resulted in a verdict of guilty and a sentence of imprisonment was imposed.

"Mr. Mosakowski in his letter of appeal to the Commission made the contention that the military court reached an improper verdict in his case. However, we have been advised that Mr. Mosakowski's case has been reviewed and the findings and sentence have been affirmed by the authority convening his court martial and the Army Board of Review. We are also informed that Mr. Mosakowski has on file a petition for review by the Court of Military Appeals. Thus, Mr. Mosakowski's case is analagous to that of a person who has been convicted of an offense in a trial court which has been affirmed by an appeals court and now has pending a request for review by a superior or supreme court.

"We have consistently held that an agency may predicate a removal action against a preference eligible on the basis of a conviction by a trial court of an offense for which a sentence of imprisonment could be imposed and need not await the results of an appeal to a supreme court.

"Under the circumstances, we must find the charges against Mr. Mosakowski are sustained by the evidence in his case.

"RECOMMENDATION

"Under all the facts and circumstances of the case, it is established that there was no violation of the appellant's rights as a veteran in connection with his removal. Therefore, it is recommended that no change be made in the personnel action of the Department of the Army in effecting the discharge of Mr. Mosakowski on June 7, 1956.

"No further appeal from this decision will be entertained from either Mr. Mosakowski or the Department of the Army unless it is submitted to the Chair-

> man, Board of Appeals and Review, U. S. Civil Service Commission, Washington 25, D. C., within seven (7) days after receipt of this decision. Notification of a further appeal should be given to this office so the case file can be transmitted promptly to the Board.

The petitioners did not appeal to the Commission's Board of Appeals and Review. During this period and later plaintiffs wrote letters to congressmen and government officials to no avail.

On or about April 12, 1957, petitioners filed a petition for a retrial to the Judge Advocate General,[17] which was denied on or about November 17, 1960. On January 14, 1960 petitioners filed an action in the United States District Court for the District of Columbia asking for declaratory relief voiding their convictions, return of fines imposed and restoration of positions.[18] On January 18, 1960, the Supreme Court decided *Grisham v. Hagan*, 361 U.S. 278 (1960), and *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960). The District Court on November 21, 1960, citing the above Supreme Court cases, ordered:

> "* * * The partial summary judgment to which the plaintiffs are entitled is a judgment for declara-

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[17]This was filed pursuant to letter of December 13, 1956 from the Adjutant General, the pertinent portion being as follows:

> "* * * As your appellate defense counsel, Captain John F. Christensen, JAGC, recently advised you, the United States Court of Military Appeals denied your petition for a grant of review on 21 November 1956. Accordingly, your sentence is final and conclusive insofar as the Office of the Judge Advocate General is concerned, subject only to your right under the Uniform Code of Military Justice, Article 73, to petition The Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. In the event you elect to submit such a petition, it must be filed on or before 13 April 1957. * * *" (R., Plaintiffs' Exhibit 3, Motion for Rehearing)

[18]Smith v. Bruckner, Civil Action No. 129-60.

> tory relief that under the doctrines established by the decisions of the Supreme Court in *Kinsella v. Singleton*, 361 U.S. 234 (1960), *Grisham v. Hagan*, 361 U.S. 278 (1960), *McElroy v. Guagliardo*, 361 U.S. 281 (1960), and *Wilson v. Bohlender*, 361 U.S. 281 (1960), the court-martial trying, convicting and imposing sentence upon the plaintiffs as specified in the pleadings was an unconstitutional exercise of court-martial jurisdiction over the plaintiffs, as civilian employees of the Army in time of peace, and the convictions and sentences imposed thereunder were void. The remaining prayers of the plaintiffs for relief, further appearing to the Court as being beyond its jurisdiction, the motion for summary judgment in all particulars other than the declaratory relief herein specified must be denied. The above appearing to the Court, it is by the Court this *21st* day of November, 1960,
>
> "Ordered and declared that the trial, sentence, and conviction of the plaintiffs, as civilian employees of the Army in time of peace, by the court-martial specified by the complaint in this cause were an unconstitutional exercise of court-martial jurisdiction and were void; and it is
>
> "Further Ordered that summary judgment for the plaintiffs in all other particulars requested be and the same hereby is denied."

On January 10, 1961, the Government appealed to the United States Court of Appeals. The appeal was dismissed by per curiam order on June 16, 1961.

Petitioners had not heard from their trial counsel and did not know the District Court had acted favorably on their action until approximately October 1961.

Petitioners had great difficulty communicating with trial counsel and after many attempts discharged him on March 23, 1962. (R., Plaintiffs' Exhibit 6, Motion for Rehearing, p. 4.) On May 29, 1962 petitioners filed separate petitions in the Court of Claims for return of fines imposed (No. 213-62) and for back pay (No. 181-62). The United States then agreed to return the fines imposed.

In No. 181-62, the United States and the petitioners moved for summary judgment. On March 17, 1967, the Court of Claims held that petitioners are barred by laches and granted the Government's motion for summary judgment. Petitioners filed a petition for a rehearing, which was denied on June 9, 1967 without opinion.

REASONS FOR GRANTING THE WRIT

(1) There is immediate need for judicial guidance regarding the application of laches to Federal back pay claims. This is particularly true when – as here – there has been illegal court-martial and incarceration of a civilian employee. There is conflict between the holdings of the Supreme Court, the Court of Claims and the United States Court of Appeals for the District of Columbia Circuit.

Laches was first applied by this Court to Federal back pay claims in *United States ex rel. Arant v. Lane*, 249 U.S. 367 (1919), primarily because the relator did not affirmatively assert his claim for reinstatement for almost two years.

In *Nicolas v. United States*, 257 U.S. 71, 75 (1921), this Court stated that a person illegally dismissed must not acquiesce for an unreasonable length of time without taking steps for his own protection against his removal. In this case, the claimant made no affirmative attempt to recover his salary or ask for reinstatement. The Court felt that this was an "abandoned title to the office and any right to recover its emoluments."

In *Myers v. United States*, 272 U.S. 52 (1926), the Court held that a delay incurred by an attempt to reinstate through action of Congress was not unreasonable. Claim was not filed with the Court of Claims until approximately 17 months after removal. The case at bar is analogous if illegal incarceration is given adequate weight.

Despite their illegal incarceration, petitioners managed to accomplish pursuit of remedies they though available. The fact that their court-martial conviction was so identical

with their removal is a major factor in the manner in which they pursued their remedies. Pursuant to a letter of December 13, 1956, they filed a petition for a new trial with the Judge Advocate General on April 12, 1957. Earlier they had pursued their appeal with the Military Court of Appeals. On January 14, 1960, on advice of counsel, an action was filed in the United States District Court for the District of Columbia Circuit asking that the court-martial conviction be voided, that the fines imposed be returned, and that they be reinstated to their positions. On January 18, 1960, the Supreme Court ruled in another case that court-martial of a civilian overseas in time of pease was unconstitutional exercise of court-martial jurisdiction. On November 21, 1960, the District Court declared that the trial, sentence and conviction of claimants by court-martial was an unconstitutional exercise of court-martial jurisdiction. An appeal was made to the Court of Appeals by the United States, which was denied by per curiam order June 16, 1961. The claimants were not aware of the status of their case until October 1961 as their counsel did not communicate with them. They diligently tried to communicate with their counsel, who had most of their records, from that period until March 23, 1962, at which time they dismissed said counsel. They obtained current counsel and the petition herein was filed on May 29, 1962.

The case on appeal is in conflict with the holdings of the United States Court of Appeals for the District of Columbia Circuit. In *Powell v. Zuckert*, 366 F.2d 634 (1966), the Court of Appeals held that a 16-month delay after exhaustion of administrative remedies was not sufficient to establish laches as a defense where claimant proved that his inability to secure legal assistance and advice was because of his uncontroverted poverty. In *Duncan v. Summerfield*, 251 F.2d 896 (1957), the Court held that the claimant should be excused for a delay of two years and eight months before seeking reinstatement because of the fact that he was awaiting the result of another controlling legal action.

The case on appeal is in conflict with a holding that laches should not be applied where the defendant fails to show resulting prejudice. *Aviles v. United States*, 151 Ct. Cl. 1 (1960).

The Court of Claims has said:

> "It is only where some great injustice would be done the defendant by so long a delay by the claimant that the doctrine of laches should be set up to defeat consideration of the claim on the merits. The equities on both sides should be carefully weighed, and it should be clear that they weigh heavily on the side of the defendant before the Court refuses to hear a case because of a delay of less than the statutory period." *Joseph F. O'Brien v. United States*, 148 Ct. Cl. 91 (1951).

The same result has been reached where claimants tried to the best of their ability to further their claim for relief. *S. Leon Levy v. United States*, 118 Ct. Cl. 106 (1950).

In a case similar to the one on appeal, *Nathan H. Mallow v. United States*, 161 Ct. Cl. 207 (1963), it was stated that:

> "Defendant should not be held guilty of laches because he was confined in prisons for a period of time, and that there was no doubt that some period must elapse before defendant could become completely rehabilitated and take time to shop for a lawyer . . . No records or testimony have been lost by reason of delay, and we think plaintiff acted as swiftly as a normal person would have under like circumstances."

In the case on appeal, the Court of Claims did not give adequate consideration to the controlling effect of the Supreme Court rulings on court-martial of civilians, the circumstances which justified delay by claimants, and the burden of proof which the United States did not meet.

The Court of Claims has effectively disregarded the equitable principle of laches. It considers primarily the length of time with little regard for the burden that should be

borne by the Government and the circumstances surrounding the period of delay. If this interpretation continues there will be little need for a statute of limitations.

(2) The Court of Claims has failed to give adequate consideration to the retroactive effect of a voided court-martial conviction upon a removal based upon said conviction.

In *Norton v. Shelby County*, 118 U.S. 425 (1886), this Court established the doctrine that an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. In *Chicot County Dist. v. Bank*, 308 U.S. 371 (1940), this Court stated that an all-inclusive statement of a principle of absolute retroactive validity cannot be justified because certain "operative facts" cannot be ignored (p. 374) and that such a determination as to validity is a matter for judicial determination (p. 377). In *Linkletter v. Walker*, 381 U.S. 618 (1965), it was held that the doctrine that evidence obtained illegally is not admissible in a state court should not be applied retroactively. The Court stated that:

> "The effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set principle of retroactivity but depends upon a consideration of particular relations and particular conduct . . . of rights, claims to have become vested, of status of prior determinations deemed to be final . . . of public policy in the light of the nature both of the statute and its previous application" (p. 627).

It stated that "nothing in the Constitution prohibits or requires retrospective effect" (p. 629).

> "We must then weigh the merits or demerits in each case by looking at the prior history of the rule in question, its purpose and effect and whether retroactive operation will further or retard its operations" (p. 629).

Finally, this Court pointed out that it has ruled retroactively in three areas in which the principle went to the "fairness of the trial – the very integrity of the fact-finding process" (p. 639). As examples the Court cited *Griffin v. Illinois*, 351 U.S. 12, *Gideon v. Wainwright*, 372 U.S. 335, and *Jackson v. Denno*, 378 U.S. 368.

The "fairness of the trial" criteria goes to the heart of rulings affecting the court-martial of civilians in time of peace. This is best expressed in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955), where this Court said:

> "it shall remain true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."

This Court also said "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution". In *Reid v. Covert*, 354 U.S. 1 (1957), this Court held that a civilian abroad is entitled to the Constitution's safeguards of trial by jury (Article III, section 2), indictment by a grand jury (Fifth Amendment), and to a speedy and public trial by an impartial jury (Sixth Amendment). The Court also detailed the dangers of subjecting civilians to court-martial.

The claimants herein were accused and convicted of a felony without indictment by grand jury, without a speedy and public trial by an impartial jury, and were subjected to excessive fines and cruel and unusual punishment. Their removal by the Department of the Army, as affirmed by the Civil Service Commission, was based solely upon the conviction by court-martial. Plainly "fairness of trial" is involved.

In *Schneider v. Rusk*, 377 U.S. 163 (1964), this Court held Section 352(a)(1) of the Immigration and Nationality Act of 1952 unconstitutional as a denial of due process. Section 352(a)(1) provided that:

> "a person who has become a national by naturalization shall lose his nationality by . . . having a continuous

residence for three years in . . . a foreign state . . . in which the place of his birth is situated . . .".

Any citizenship proceeding removing such persons from their status as citizens is now null and void because of this Court's decision and the retroactive interpretation placed on the decision by the Department of State.

(3) The Court of Claims failed to give adequate consideration to the question whether conviction by court-martial charging a veteran preference eligible with commission of certain acts is substantial evidence by itself to support removal. This question is of vital importance to the administration and interpretation of Section 14 of the Veterans Preference Act of 1944, 5 USC 863, which concerns both civilian and military personnel. Can a veteran preference eligible be removed solely on the evidence of a court-martial conviction without an independent and thorough investigation?

The Veterans Preference Act of 1944, *supra*, states that ". . . after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations . . ." This section has been interpreted by the Court of Appeals in New York to mean a proceeding in the nature of a *de novo* hearing. *McTiernan v. Gronouski*, 337 F.2d 31 (1964). The Court below in its decision seems in conflict with this interpretation, although it had earlier held a veteran is entitled to an investigation by the Civil Service Commission. *Shadrick v. United States*, 151 Ct. Cl. 408 (1963). Both the Department of the Army and the Civil Service Commission relied solely on the proof of the conviction itself as reason for removal.

(4) The Court of Claims failed to give adequate consideration as to whether removal of a veteran preference eligible is defective because of denial of the right to personal appearance, hearing, right to review the evidence of the opposing party, to present witnesses and cross-examine opposing witnesses, and because of arbitrarily, relying on the documentary record of a court-martial conviction without independ-

ent investigation. Pursuant to Section 14 of the Veterans Preference Act of 1944, *supra*, and the regulations issued thereunder, a veteran is entitled to these safeguards.

The Court has held that denial of a procedural right is fatal to a removal proceeding. *Williams v. Zuckert*, 372 U.S. 765 (1963). There is a need now that this Court give a clear and definite explanation to veteran preference eligibles as to their rights under the Act. The interpretation in the Court below appears to vary from case to case. In *Nathan H. Mallow v. United States, supra,* the Court held that denial of the right of a personal appearance in regard to any proposed discharge makes the removal defective and entitles claimant to recover base pay lost as a result of invalid suspension and removal. In the case on appeal, however, the Court of Claims seemed to disregard the denial of these rights and inferred that the Government had met the argument "foursquare".

(5) Another important question is: When is it possible to dispense with exhaustion of administrative remedies? The Court of Claims held that petitioners' claims demanded rejection by the very fact that they did not avail themselves of the right to appeal to the Board of Appeals and Review of the Civil Service Commission. The Court below inferred that it might be possible to "carve out an exception to the 'exhaustion doctrine' on the grounds of the special circumstances involved (claimants' confinements in Japan)." However, in *Nathan H. Mallow, supra,* the Court of Claims stated that Mallow's failure to exhaust his administrative remedies by appeal to the Civil Service Commission was not necessary as:

> "he was not a lawyer, he had no access to any legal talent of any sort, and we do not think plaintiff should be penalized for accepting what the Army told him; that is, that he had ten days to appeal from the effective date of removal. This, it seems to us to be perfectly normal for a person of plaintiff's level, especially when he is subjected to the strain of confinement in a strange land and under the stress of the circumstances and sentence by the general court-

martial. Therefore it appears that this is one of the unusual circumstances alluded to by this Court in *Adler et al. v. United States*, 134 Ct. Cl. 200, 203 (1956), wherein the Court stated:

> 'we think that an employee must appeal to the Civil Service Commission before resorting to the courts, *except in unusual circumstances*'."

In the case at bar, the Court of Claims has ignored the precedent of the *Mallow* case. The "circumstances" of both cases are similar. See also Kenneth Culp Davis, *Administrative Law Treatise*, Sec. 20.07, p. 97, where it is stated: "Impossibility or improbability of obtaining adequate relief by pursuing administrative remedies is often a reason for dispensing with the exhaustive treatment". See also *McElroy v. Guagliardo*, 259 F.2d 927, 929 (1958); *Railway Conductors of America v. United States*, 329 U.S. 520, 524 (1947); and *U. S. Alkali Export Association v. United States*, 325 U.S. 196, 210 (1945).

CONCLUSION

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

James J. Bierbower
Commonwealth Building
Washington, D. C.

Harry A. Inman
1200 17th Street, N. W.
Washington, D. C.

Counsel for Petitioners

September 7, 1967

APPENDIX A

STATUTES INVOLVED

The Constitution of the United States

Article III, Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Fifth Amendment

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in

the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defense.

Section 14 of The Veterans Preference Act, 5 USC 863 (1964) § 863. Discharge, suspension, etc., only for cause; reason in writing; advance notice; personal appearance; findings and recommendations.

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or barred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable

cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, that such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: Provided further, that the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title.

The Uniform Code of Military Justice, 64 Stat. 108 *et seq* (May 5, 1950) codified in 10 U.S.C. 801 *et seq* (1964) provides in pertinent part as follows:

Art. 2 [10 U.S.C. § 802] Persons subject to the code.

The following persons are subject to this code:

* * *

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party

or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States * * *

* * *

Art. 81 [10 U.S.C. § 881] Conspiracy.

Any person subject to this code who conspires with any other person or persons to commit an offense under this code shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

* * *

Art. 92 [10 U.S.C. § 892] Failure to obey order or regulation.

Any person subject to this code who —

(1) violates or fails to obey any lawful general order or regulation; * * * shall be punished as a court-martial may direct.

* * *

Art. 134 [10 U.S.C. § 934] General article.

Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

REGULATIONS INVOLVED

AR 35-510, Foreign Financial Operations, November 1, 1951 provided in pertinent part as follows:

Section I
General

1. Scope. – These regulations –

a. Set forth Department of the Army policies that hereafter payment to United States authorized personnel (par. 3c) will be made in United States dollars or dollar instruments. However, military payment certificates will be used for payments to United States authorized personnel and as the official medium of exchange for all transactions within establishments of the Armed Forces of the United States in the following areas:

* * *

Japan and outlying Islands

* * *

3. Definitions. – a. *Military payment certificate.*

(1) The military payment certificate is defined as an instrument, denominated in United States dollars or fractions thereof, which is the official medium of exchange in all establishments in areas designated by the Secretary of the Army.

(2) Military payment certificates are issued in denominations of 5 cents, 10 cents, 25 cents, 50 cents, $1, $5, and $10.

* * *

c. United States authorized personnel.

(1) Personnel who come under these regulations (hereinafter referred to as United States authorized personnel) and who may utilize military payment certificates and dollar instruments defined herein, subject to limitations prescribed in paragraph 11, are –

* * *

(b) Civilians, who are citizens of the United States, employed directly, or indirectly through contractors, by the Department of Defense.

* * *

10. Limitations. – a. The military payment certificate is for use only in the Department of Defense by United States authorized personnel, in accordance with applicable rules and regulations.

* * *

d. Under no circumstances will authorized personnel or disbusing officers accept military payment certificates from, transfer military payment certificates to, or exchange military payment certificates for persons other than authorized United States personnel, or accept or exchange military payment certificates after the date designated by the Secretary of the Army for their acceptance or exchange.

* * *

AR 35-510, Foreign Financial Operations, August 20, 1954, provided in pertinent part as follows:

2. Scope. * * *.

a. [same as 1 a. above]

* * *

3. Definitions. * * *

b. [same as 3 a. above] * * *

c. * * * [basically the same as 3 c. above]

* * *

16. Limitations. * * *

d. [same as 10 d. above]

Army Forces Far East Circular No. 69, Control of Beverage Sales, March 19, 1953, provided in pertinent part as follows:

* * *

* * *

V. SALES TO INDIVIDUALS. 16. Authorized Personnel. a. The Commanding Generals, Eighth Army, Korean Communications Zone, and Fifth Air Force, will establish the categories of personnel authorized to purchase alcoholic beverages in bulk from locker funds, clubs, and open messes in Korea.

b. In Japan, the following categories of adult personnel (21 years of age or older) may purchase alcoholic beverages in bulk from locker funds, clubs, and open messes, subject to membership requirements of the funds, clubs, and open messes:

* * *

(2) Members of the civilian component of the United States Forces, Japan, as defined in the Administrative Agreement and as may be subsequently further clarified by the Commanding Generals, United States Army Forces, Far East, and Far East Air Forces.

* * *

17. Maximum Purchases Authorized. a. In Japan and Korea, effective 1 May 1953, the following quantities are established as the maximum authorized purchases during the periods of time indicated.

(1) Personnel in categories listed in subparagraphs 16b(1) through (5) assigned for 30 days or more - 12 bottles of liquor and 24 bottles of wine per month per authorized person.

* * *

VI. PROHIBITIONS. 19. The following are prohibited:

a. Sale, gift, barter, donation or other disposition of alcoholic beverages to any individual under 21 years of age or to persons not authorized by this directive to purchase alcoholic beverages.

* * *

Paragraphs 5 b. and 6 a. of Army Forces Far East Circular No. 142, Control of Beverage Sales, August 15, 1954 basically set forth the same provisions as paragraphs 17 a. and 19 a. respectively of the 1953 Circular, *supra*.

The Civil Service Commission Regulations in effect at the time relevant hereto appear at 20 F.R. 2699 *et seq.*, April 23, 1955, but the citation 5 CFR is used herein for convenience. Those regulations provide as follows:

> *5 CFR 22.302(d) Extension of time limit.* The time limit may be extended, in the discretion of the Commission, upon a showing by the employee that he was not notified of the applicable time limit and was not otherwise aware of the limit or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit.
>
> *5 CFR 22.401(c) Evidence available to both parties.* All relevant representations shall be discussed with both parties to the appeal and shall be available for review by them, with the following exceptions: Where adverse action has been taken on the basis of the reported mental condition of the individual concerned or other condition of such a nature that a prudent physician would hesitate to inform a person suffering from such a condition as to its exact nature and probable outcome, the medical evidence of record will be made available only to a duly licensed physician designated in writing by the appellant or by appellant's representative.
> [20 F.R. 2699, Apr. 23, 1955, as amended at 21 F.R. 3167, May 15, 1956]
>
> *5 CFR 22.402 Right to a hearing.* The employee shall have a right to a hearing before the office of the Commission undertaking initial adjudication of his case. This shall be the only opportunity for hearing as a matter of right. The employee shall be advised of his right to a hearing and shall express his desire in writing.

5 CFR 22.501 Appeals to the Board of Appeals and Review. (a) Appeal from decision of a Commission office. When an employee or the employing agency elects to appeal from a decision of the Chief, Appeals Examining Office or regional director, such appeal shall be made to the Board of Appeals and Review (hereinafter referred to as the "Board"), U.S. Civil Service Commission, Washington 25, D. C.

(b) *Time limit for filing.* Such appeal must be filed within seven (7) days after the date of receipt of notification of the decision. This time limit may be extended, in the discretion of the Board, only upon a showing that circumstances beyond the control of the employee or the employing agency prevented the filing of a further appeal within the prescribed seven (7) days.

(c) *Form and content.* The appeal shall be in writing and shall set forth the basis for the appeal.

5 CFR 22.502(b) Personal appearance. In its discretion, the Board may afford the parties an opportunity to appear personally and present oral arguments and representations. No oral evidence shall be submitted which could have been accepted in connection with the initial appeal.

5 CFR 22.603 Introduction of evidence. Opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee and his designated representative and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses.

APPENDIX B

In the United States Court of Claims

No. 181–62

(Decided March 17, 1967)

LANDON A. JACKSON, EMMORIE JENKINS, FELIKS A. MOSAKOWSKI, WILLIE C. SHAW, JOYCE K. SMITH, AND ELMER H. WASHINGTON v. THE UNITED STATES

James J. Bierbower, attorney of record, for plaintiffs. *James F. Fort* and *Harry A. Inman*, of counsel.

Edgar H. Twine, with whom was *Assistant Attorney General Barefoot Sanders*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

ON DEFENDANT'S MOTION AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

COLLINS, *Judge*, delivered the opinion of the court:

More than 5½ years prior to the commencement of this suit plaintiffs were removed from their positions as civilian employees of the Department of the Army. In this action, they allege both procedural and substantive irregularities in their removal proceedings and, upon these grounds, they base their present claims to back pay.

Plaintiffs are all veterans' preference eligibles, who, at the time of their removals, were in the excepted service, working for the Department of the Army in Japan. On March 2, 1956, each of the six was tried by a general court-martial, con-

vened at Tokyo, Japan.[1] The charges involved a conspiracy to unlawfully purchase and dispose of whiskey and the acceptance, from other than authorized personnel, of military payment certificates.[2] Additionally, plaintiffs Shaw, Jenkins, and Mosakowski were charged with attempted subornation of perjury.

Both the purchase and disposition of whiskey and the use of the military payment certificates were matters which were defined and controlled by published Army regulations.[3] Under article 92 of the Uniform Code of Military Justice, the violation of a regulation was a punishable offense.[4] Con-

---

[1] Military jurisdiction over civilian employees was premised upon the Uniform Code of Military Justice, 10 U.S.C. §§ 801–935 (1964). In 1956 and prior to its amendment, article 2, which defines "Persons subject to the Code," provided in part the following (ch. 169, 64 Stat. 109 (1950)):

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

[2] This certificate (referred to as "MPC") was the designated medium of exchange for all Army personnel, civilian and military, stationed in the Far East.

[3] AR 35–510, Foreign Financial Operations, Nov. 1, 1951, 32 C.F.R. § 536.80(d) (1951), provided that use of the military payment certificate was restricted entirely to United States authorized personnel and that,

"(d) Under no circumstances will authorized personnel or disbursing officers accept military payment certificates from, transfer military payment certificates to, or exchange military payment certificates for persons other than authorized United States personnel, or accept or exchange military payment certificates after the date designated by the Secretary of the Army * * * for their acceptance or exchange."

Like the military payment certificate, the use and disposition of alcoholic beverages was likewise restricted to United States authorized personnel. Army Forces Far East Circular No. 69, Control of Beverage Sales, Mar. 19, 1953, prohibited—

"a. Sale, gift, barter, donation or other disposition of alcoholic beverages to any individual under 21 years of age or to persons not authorized by this directive to purchase alcoholic beverages."

[4] Article 92 of the Uniform Code of Military Justice, ch. 169, 64 Stat. 136 (1950) (now 10 U.S.C. § 892 (1964)), provided:

"Any person subject to this code who—

(1) violates or fails to obey any lawful general order or regulation; or
(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same; or
(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct."

spiring to commit an offense was specified under article 81 as a separate punishable act.[5]

Based upon evidence showing their participation in the illegal sale of alcoholic beverages to Japanese citizens, each plaintiff was found guilty of violating articles 81 and 92. The charge of attempting to secure perjured testimony (punishable under article 134 of the Uniform Code of Military Justice) was sustained only as to plaintiff Jenkins. Plaintiffs Jackson and Washington were sentenced to a year's confinement and fined $1,500 each. Shaw and Smith also received 1-year sentences and were fined $1,000 each. Mosakowski was fined $2,500 and was given a 1-year term, and Jenkins was sentenced to a 2-year term and fined $1,000.[6]

These sentences, which were approved by the convening authority on April 12, 1956, were reviewed, along with the record, by an Army Board of Review. This body's approval of the findings and the sentences was handed down on June 27, 1956. Further review was sought before the United States Court of Military Appeals. On September 11 and November 21, 1956, the United States Court of Military Appeals denied plaintiffs' petitions for a grant of review of the Board of Review's decisions.

The proceedings removing plaintiffs from their positions were instituted contemporaneously with the court-martial proceedings. Plaintiffs were informed of their proposed removals through advance notices sent to them on April 5, 1956. In the case of plaintiff Smith, his notice was dated March 30, 1956. These notices set forth, as grounds for the proposed removals, essentially the same charges that had been lodged against them in the court-martial proceedings. Al-

[5] Article 81 of the Uniform Code of Military Justice, ch. 169, 64 Stat. 134 (1950) (now 10 U.S.C. § 881 (1964)), provided:

"Any person subject to this code who conspires with any other person or persons to commit an offense under this code shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct."

[6] Plaintiffs Smith and Shaw were released at the expiration of their sentences (after allowance for good behavior) on December 21, 1956, and December 27, 1956, respectively. Jackson and Washington were released on November 20, 1956, and Jenkins on March 7, 1957—each having been granted a remission of his sentence on grounds of general clemency. As to Mosakowski, his failure to have paid the $2,500 fine within the period of his 1-year confinement resulted in an extension of his term—this as called for by the original sentence. However, in August 1957, upon his having paid the fine in full, he was granted parole.

though each was advised of his right to respond to these charges, plaintiffs Smith and Washington did not do so. The others did respond. Shortly after the court-martial convictions were affirmed by the convening authority, plaintiffs were advised of their removals. In the case of plaintiffs Jackson, Jenkins, and Washington, their terminations became effective on May 31, 1956. Plaintiffs Mosakowski, Shaw, and Smith were removed as of June 7, 1956.

The appellate remedies open to them were specifically pointed out. Each was advised of his right either to request review of the removal decision within 15 days under the grievance procedures provided by the Department of the Army's civilian personnel regulations or, as veterans' preference eligibles, to process an appeal within 10 calendar days to the United States Civil Service Commission (hereinafter the "Commission"). With the exception of plaintiff Jackson—whose appeal was rejected for lack of timeliness [7]—the remaining plaintiffs availed themselves of their procedural rights to Commission review.

Pursuant to the regulations governing its review procedures, the Commission advised plaintiffs of their entitlement to a hearing. It was pointed out that, should they be unable to secure their release from confinement, attendance at the hearing could be accomplished through a designated representative. Only plaintiff Washington requested a hearing. However, his request for a stay of the proceedings in order to permit his personal attendance was denied. Therefore, in each case, the Commission conducted its review on the basis of the documentary record.

The Commission's adjudication of the cases resulted in affirmation of the removal actions. Plaintiffs were advised accordingly by letters dated September 18, 1956 (and September 28, 1956, in plaintiff Washington's appeal). Each was also informed that further action on the claim would require submission of an appeal, within 7 days, to the Com-

[7] Plaintiff Jackson's appeal was postmarked July 3, 1956. Inasmuch as this was well beyond the 10-day appeal period, the Civil Service Commission requested, from Jackson, further information concerning the reasons or the circumstances accounting for his untimely filing. Although he was advised that an explanation would be necessary in order to permit any action on his claim, Jackson did not respond. On August 23, 1956, he was advised that his case had been closed because of his failure to prosecute.

mission's Board of Appeals and Review. None of the plaintiffs pursued this further avenue of administrative relief.

Although plaintiffs did seek further review of their court-martial convictions by way of a petition for retrial, submitted to the Judge Advocate General in 1957, action on their present back pay claims was not instituted until January 1960. It was at this time that plaintiffs filed an action in the United States District Court for the District of Columbia (*Sub nom. Smith* v. *Bruckner*, Civil Action No. 129–60), wherein they sought, *inter alia*, declaratory relief voiding their convictions, return of the fines that had been imposed, and restoration to their positions.

On November 21, 1960, the district court, in reliance upon the Supreme Court's then recent pronouncements in *Grisham* v. *Hagan*, 361 U.S. 278 (1960), and *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960), ordered that:

> * * * The partial summary judgment to which the plaintiffs are entitled is a judgment for declaratory relief that under the doctrines established by the decisions of the Supreme Court in *Kinsella* v. *Singleton*, 361 U.S. 234 (1960), *Grisham* v. *Hagan*, 361 U.S. 278 (1960), *McElroy* v. *Guagliardo*, 361 U.S. 281 (1960), and *Wilson* v. *Bohlender*, 361 U.S. 281 (1960), the court-martial trying, convicting and imposing sentence upon the plaintiffs as specified in the pleadings was an unconstitutional exercise of court-martial jurisdiction over the plaintiffs, as civilian employees of the Army in time of peace, and the convictions and sentences imposed thereunder were void. The remaining prayers of the plaintiffs for relief further appearing to the Court as being beyond its jurisdiction, the motion for summary judgment in all particulars other than the declaratory relief herein specified must be denied. The above appearing to the Court, it is by the Court this *21st* day of November, 1960,
>
> ORDERED and declared that the trial, sentence, and conviction of the plaintiffs, as civilian employees of the Army in time of peace, by the court-martial specified by the complaint in this cause were an unconstitutional exercise of court-martial jurisdiction and were void; and it is
>
> FURTHER ORDERED that summary judgment for the plaintiffs in all other particulars requested be and the same hereby is denied.

Invalidation of the court-martial action was appealed by the United States on January 10, 1961. On June 16, 1961, the appellate court entered a per curiam order dismissing the appeal; the present suit was not commenced until May 29, 1962.

As a basis for recovery in this suit, plaintiffs assert the following: First, they challenge their removals on evidentiary grounds. Specifically, their position is that the Commission should not have upheld the validity of their removals since the *only* evidence which was offered in support of the charges consisted of certified copies of their court-martial convictions. In light of this, they attack the Commission's action and label its determination devoid of substantial evidence. As a second ground, they claim that, even if the Commission had been correct in relying entirely upon the court-martial convictions for its proof of the removal charges, nevertheless its determinations may no longer stand because the convictions have since been invalidated. The key to this argument is the assumption that the 1960 Supreme Court decisions,[8] striking down all peacetime military jurisdiction over civilian overseas personnel, must be given full retroactive application. And finally, plaintiffs argue a procedural irregularity stemming from the alleged denial of their right to a personal appearance before the Civil Service Commission.

The Government has met these arguments foursquare. But, in addition to its defense on the merits, it takes the affirmative position that plaintiffs are barred from any recovery either (1) because of their failure to have exhausted available administrative remedies or (2) because of their long delay in bringing suit in the Court of Claims. The affirmative defenses are well taken.

Though advised of their rights of appeal to the Civil Service Commission's Board of Appeals and Review, plaintiffs elected not to avail themselves of this potential avenue of redress. On this score alone—their failure to exhaust administrative remedies—the claims would demand rejection. *Pine* v. *United States*, 178 Ct. Cl. —— (Jan. 1967).

[8] *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960); *Grisham* v. *Hagan*, 361 U.S. 278 (1960); *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960); and *Wilson* v. *Bohlender*, 361 U.S. 281 (1960).

But even if we were to embrace plaintiffs' argument and, in this instance, carve out an exception to the "exhaustion doctrine" on the grounds of the special circumstances involved (plaintiffs' confinements in Japan), that exception would do no more than expose a further—and this time insurmountable barrier—their long delay in bringing suit in this court.

Recognition of the laches doctrine as an appropriate defense to a back pay claim is a matter to which this court has long acceded. *Henry* v. *United States*, 139 Ct. Cl. 362, 366–70, 153 F. Supp. 285, 288–90 (1957); *Nicholas* v. *United States*, 55 Ct. Cl. 188 (1920), *aff'd*, 257 U.S. 71 (1921). Now accorded formal status in the Rules of the United States Court of Claims (see Rule 19(b)), the application of laches to civilian Federal service pay claims found its first expression in *United States ex rel. Arant* v. *Lane*, 249 U.S. 367 (1919). Since then, its application has been consistently endorsed. See authorities cited in *Alpert* v. *United States*, 161 Ct. Cl. 810, 821 (1963).

While traditionally confined to equity proceedings, use of the laches concept in the area of pay litigation finds its justification on the ground that public policy demands diligence in the prosecution of erroneous dismissal actions. As stated in *Nicholas* v. *United States*, *supra*, 257 U.S. at 75:

> We agree with the Court of Claims that a person illegally dismissed from office is not thereby exonerated from obligation to take steps for his own protection and may not for an unreasonable length of time acquiesce in the order of removal, which it was within the power of the Secretary to make, and then recover for the salary attached to the position. * * *

Plaintiffs in this case waited for more than 3 years, after final administrative action had been taken, before attempting to secure any judicial relief on their pay claims. And discounting their respective periods of confinement, they permitted from 2½ to 3 years to elapse. They permitted another 11½ months to elapse between the time the district court's action was finalized on appeal and the commencement of the present suit. In our judgment, these facts fully support the Government's position that plaintiffs' claims should not now be examined on the merits.

In their attempt to hurdle the laches barrier, plaintiffs contend that such a defense is wholly inappropriate where, as here, the facts reveal their consistent endeavors to overcome the court-martial convictions. This argument builds in the wrong direction.

Their present claims for back pay are related to their criminal convictions only in the sense that each claim was premised upon common factual elements, *i.e.*, an identity in the charges against them. But apart from this single common consideration, their claims—one alleging erroneous conviction, the other erroneous discharge from Federal service—relate to entirely separate transactions, presenting distinct and independent legal issues which were redressable through separate procedures. The very contention now presented recognizes this separateness. Thus, the lack of substantial evidence, which plaintiffs cite as a separate ground for invalidation of their dismissals, was a valid ground of attack, always open to them, in no sense dependent upon their first securing a reversal of the court-martial convictions, and—most importantly—a ground that could have been presented for our consideration more than 5 years ago. Measured by these considerations, the degree of diligence, which back pay claims demand, has clearly not been satisfied.

On the other hand, were we to treat the back pay claim as an inseparable component of the criminal conviction, plaintiffs would gain little through this union. While it is true that they did petition the Judge Advocate General in 1957 for rehearing on the court-martial convictions, the fact remains that this was a wholly unnecessary step; it was purely a permissive remedy rather than a mandatory one and, consequently, it fails to demonstrate that degree of diligence which a claim for back pay demands. See *Gersten* v. *United States*, 176 Ct. Cl. ——, —— (slip op. p. 3), 364 F. 2d 850, 852 (July 1966); *Alpert* v. *United States*, *supra* at 823.

For our purposes, the significant fact is that *full* relief was available at all times to plaintiffs in this forum. Thus, accepting the hypothetical proposition that total relief required invalidation of the court-martial conviction—that relief, if merited, could have been obtained in this court. See *Shaw* v. *United States*, 174 Ct. Cl. 899, 357 F. 2d 949 (1966). Hence,

whether one views the present claims as wholly independent of their criminal counterparts or simply as opposites of the same coin, plaintiffs, in either situation, fall prey to their own delays. No matter how viewed, plaintiffs find themselves without sufficient explanation for the more than 3 years that intervened between the date of final administrative action (September 1956) and their appearance in a court of law (United States District Court for the District of Columbia, January 1960). During that time, they did little more than process an unnecessary step (an appeal to the Judge Advocate General), one neither essential to the exhaustion of any administrative remedies relating to their claims nor essential to the jurisdiction of either the district court or this court.

The fact that plaintiffs were successful in overturning their court-martial convictions does not cast their present pay claims in a different light. It does not demand that this court now ignore their prior lack of diligence. In particular, would we hold to this view where, as here, the facts show that plaintiffs permitted another 18 months to elapse between the date of the district court's order of November 21, 1960 (holding that it had no jurisdiction to grant them job restoration), and the commencement of suit in the Court of Claims on May 29, 1962. Considering the length of time that had already elapsed by that date, their failure to proceed more promptly, after the district court's action, was an unwarranted aggravation of a much delayed claim.

Plaintiffs do not allege that they were unaware that this was the proper forum for their back pay claims. They have offered nothing by way of justification or excuse for the delays that ensued. On these facts, we hold that plaintiffs are barred by laches. Accordingly, defendant's motion for summary judgment is granted, plaintiffs' cross-motion for summary judgment is denied, and the petition is dismissed.

[Caption Omitted]

ORDER

These cases come before the court on motions for reconsideration, rehearing, to vacate order, and for review and for further relief under Rules 68 and 69 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this 9th day of June 1967, that said motions be and the same are denied as follows:

* * *

181-62 Landon A. Jackson, et al. Plaintiffs' motion for rehearing.

* * *

BY THE COURT

Wilson Cowen
Chief Judge

APPENDIX C

In the United States Court of Claims

No. 286-60

(Decided April 5, 1963)

NATHAN MALLOW v. THE UNITED STATES

Michael A. Schuchat for plaintiff.

LeRoy Southmayd, Jr., with whom was *Acting Assistant Attorney General John W. Douglas*, for defendant.

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE, and DAVIS, *Judges*.

OPINION

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiff, a veteran and former civilian employee of the Department of the Army, seeks to recover the pay of his civilian position during the period he was in prison as a result of convictions by courts-martial in Japan. He alleges that his removal was unlawful in that it was a violation of pertinent civil service statutes and regulations, a violation of his rights under section 14 of the Veterans' Preference Act of 1944, 58 Stat. 390, as amended 61 Stat. 723, and was based on unconstitutional and completely invalid courts-martial.

At the outset it is noted that there can be no question as to the invalidity of plaintiff's convictions, since the Supreme Court in the case of *McElroy* v. *Guagliardo*, 361 U.S. 281, specifically held that such an action was in violation of the Constitution and invalid.

The sequence of events leading to plaintiff's dismissal are as follows: On May 21, 1953, plaintiff purchased a 1953

Cadillac automobile from an individual in New York City, to be delivered to plaintiff in Japan. Sometime thereafter, pursuant to an undated contract, plaintiff agreed to sell the automobile to a Japanese National, for the sum of 3,790,000 yen ($10,500). On July 1, 1953, plaintiff appeared before the U.S. Vice Consul in Tokyo, and executed a bill of sale, which purported to transfer the Cadillac automobile to the Japanese National, in consideration of $5,500, receipt of which was acknowledged in the same instrument. On July 2, 1953, plaintiff, in connection with effecting delivery of the automobile, which was then at the port in Yokohama, executed FEC Form 380, entitled "Customs Free Import or Export of Cargo or Customs Declaration of Personal Property," which document was, in turn, signed by the certifying officer and the authenticating officer. Plaintiff therein certified that the Cadillac 4-door sedan, Model Fleetwood 60S, "is imported by me for the personal use of myself (or my dependents) and that such property will not be disposed of to persons or agencies not accorded the benefits of the Administrative Agreement except as authorized by regulations."

On December 11, 1953, plaintiff was tried by a special court-martial convened by the Commanding Officer, Camp Tokyo, Honshu, Japan. He was charged with having violated Article 107 of the Uniform Code of Military Justice, in that on July 2, 1953, he falsely signed an official document with intent to deceive (FEC Form 380). He was also charged with having violated Article 92 of the Uniform Code of Military Justice in that (1) he failed to register his privately owned vehicle with the Provost Marshal, as required by regulations, and (2) that he transferred his privately owned vehicle to a Japanese National in violation of the regulations. Although plaintiff entered a plea of "not guilty" to all of the charges and specifications, he was found guilty as charged and sentenced to be confined at hard labor for six months and to pay a fine of $2,000. The sentence was approved by the convening authority and found to be legally sufficient in the Office of the Command Staff Judge Advocate.

Plaintiff, on March 2, 1954, was notified of proposed action that he be suspended from pay and duty status for 30 days beginning on or about March 4, 1954, pending removal ac-

tion. Simultaneously plaintiff was notified in writing of his right to answer the advance notice in writing and his right to submit evidence within 24 hours from the date of the notice of proposed suspension.

On March 2, 1954, he was notified by another letter of the removal action and also at the same time notified of his right to answer in writing and his right to submit evidence within 10 days of said date. In response to those notifications, plaintiff under date of March 3, 1954, requested by letter to the Civilian Personnel Section, Headquarters, Second Command APO 500, among other things, that he be allowed to appear before a civil service grievance committee in accordance with the Veterans' Preference Act of 1944, *supra*.

On March 4, 1954, plaintiff was notified in writing by the Department of the Army that he was suspended effective March 6, 1954, for 30 days pending removal for violation of Articles 107 and 92 of the Uniform Code of Military Justice, 10 U.S.C. 801.

On March 16, 1954, plaintiff was advised of adverse action on his request for the grievance committee hearing. At the same time, he was advised that his removal would be effective on or after 30 days from March 2, 1954, and that he had the right to appeal to the Civil Service Commission under section 14 of the Veterans' Preference Act, *supra*, within 10 days after the effective date of removal.

Apparently plaintiff was not permanently removed at the expiration of 30 days from March 2, 1954, because in June and July of 1954 plaintiff was tried by an Army general court-martial and found guilty of various violations of Articles 81 and 92 of the Uniform Code of Military Justice, *supra*, which violations involved prohibited money transactions occurring in 1953.

On October 25, 1954, plaintiff was notified in writing that effective August 27, 1954, he was removed from his position. The notice stated in part as follows:

> Removed for violation of the Uniform Code of Military Justice, Article 107 and Article 92. Subject employee imported a 1953 Cadillac four-door sedan for his own personal use and during the same month transferred it to Kichinosuke Nohara, a Japanese National, which transfer is in violation of current regulations. In final

notice of proposed adverse action, removal, employee was given notice of the right to appeal to the Civil Service Commission under Section 14 of the Veterans' Preference Act.

No appeal was taken to the Civil Service Commission from this action.

A Board of Review in the Office of the Judge Advocate General of the Army reviewed the action of the general court-martial and made certain modifications in the findings but approved plaintiff's guilt as to other specifications relating to dollar manipulations. He was sentenced to three years' imprisonment and given a fine in the amount of $25,000, which carried with it an order of confinement until said $25,000 was paid. As a consequence of the courts-martial plaintiff was confined in Army prisons from December 10, 1953 to March 13, 1957. It is for this period of time plaintiff seeks recovery.

Defendant contends plaintiff cannot recover because (1) he has failed to exhaust his administrative remedy by not appealing to the Civil Service Commission; (2) because his removal was procedurally proper; and (3) because he is guilty of laches.

In our judgment plaintiff is not barred in this action for failure to appeal to the Civil Service Commission. In the first place, plaintiff was notified of the right to appeal within 10 days of the effective date of his removal. However, the effective date of his removal was August 27, 1954, but plaintiff was not informed of the action until October 25, 1954, which was, of course, more than 10 days after the effective date. This is not to say that the Civil Service Commission would not have entertained an appeal, but plaintiff at that time was in jail in Japan. He was not a lawyer, he had no acess to any legal talent of any sort, and we do not think plaintiff should be penalized for accepting what the Army told him; *i.e.*, that he had 10 days to appeal from the effective date of his removal. This, it seems to us, to be perfectly normal for a person of plaintiff's level, especially when he is subjected to the strain of confinement in a strange land and under the stress of the circumstances and sentence by the general court-martial. Therefore, it appears that this is

one of the unusual circumstances alluded to by this court in *Adler, et al.* v. *United States*, 134 Ct. Cl. 200, 203, wherein the court stated:

> * * * we think that an employee must appeal to the Civil Service Commission * * * before resorting to the courts, *except in unusual circumstances.* [emphasis supplied]

Since we believe in the circumstances of this case that plaintiff has the right to come to this court without an appeal to the Civil Service Commission, we must now concern ourselves with the question of whether or not any procedural error is present in plaintiff's removal.

Section 14 of the Veterans' Preference Act of 1944, *supra*, provides that a veteran's preference eligible shall have a right to make a personal appearance in regard to any proposed discharge. Beyond question, plaintiff was not granted this right. Failing in this respect, we think plaintiff's removal was defective and, under the decisions of this court, plaintiff is entitled to recover back pay lost as a result of the invalid suspension and removal. *Blackmar* v. *United States*, 128 Ct. Cl. 693.

Defendant finally says plaintiff is not entitled to recover because has has been guilty of laches. In this respect the record shows that plaintiff was confined in Army prisons until March 13, 1957. This suit was filed in July of 1960, approximately three years later. No doubt some time must have elapsed before plaintiff became completely rehabilitated, and no doubt it took some time to shop for a lawyer and some time was spent by the lawyer in preparation of this petition and investigation incident thereto. No records or testimony have been lost by reason of delay, and we think plaintiff acted as swiftly as a normal person would have under like circumstances.

We are, however, confronted with a serious problem affecting plaintiff's recovery. He had a 2-year employment agreement effective March 31, 1952. Under normal circumstances, an employee could not recover beyond the expiration date of his employment contract. Whether in this case the contract was extended or renewed we do not know. We have not been told, and do not know, whether or not plaintiff had been

blanketed into the civil service of the United States, or had the right to work after March 31, 1954. Unless the contract was extended or renewed, or plaintiff had some civil service rights of employment, plaintiff's recovery would be limited to the days he was prevented from working by reason of his unlawful removal, which would amount to approximately three weeks. If the contract was, either before or after the letter of charges against plaintiff, in fact extended and/or renewed, or plaintiff had some sort of rights to employment, plaintiff would be entitled to recover for the 3-year period prayed for.

Thus, at this time, we hold that plaintiff was illegally removed from his position and is entitled to recover the pay lost by reason thereof. However, judgment is suspended at this time and the case is remanded to the Commissioner of this court for further proceedings relative to a determination of the question of plaintiff's right to employment after expiration of his contract and the amounts which plaintiff may be entitled to recover.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Mastin G. White, and the briefs and argument of counsel, makes findings of fact as follows:

Introductory Statement

The plaintiff, formerly a civilian employee of the Department of the Army in Japan, was charged, tried by Army courts-martial in Japan, convicted, sentenced, and imprisoned from December 10, 1953, until March 13, 1957, because of alleged violations of the Uniform Code of Military Justice. In the present action, the plaintiff, who was first suspended and later removed from his civilian position, asserts a claim for compensation during the period of his imprisonment, computed in accordance with the pay rate applicable to the position from which he was suspended and removed.[1]

[1] Although the plaintiff's imprisonment began on December 10, 1953, the evidence indicates that he was not suspended from his civilian position until March 6, 1954.

1. The plaintiff is a citizen of the United States. He is the sole owner of the claim asserted in this action, and no assignment or transfer of the claim or any part of it has been made by him.

2. On March 2, 1952, the plaintiff was employed by the Department of the Army in a civilian position as a clerk, GS–3. His appointment was an "Excepted Appointment" under Civil Service Regulations 6.101(h), Schedule A, and did not confer a competitive (classified) civil service status on the plaintiff. The appointment was subject to the satisfactory completion of a trial period of 1 year.

3. The plaintiff was assigned to General Headquarters, Far East Command, Japan, under a 2-year employment agreement effective upon the date of his arrival in Japan. The plaintiff arrived in Japan on March 31, 1952.

4. At all times pertinent to this litigation, the plaintiff was entitled to veterans' preference rights.

5. On May 21, 1953, the plaintiff purchased a 1953 Cadillac automobile from one Vitali Karant, 2350 Broadway, New York, N.Y., to be delivered to him in Japan.

6. Sometime after May 21, 1953, pursuant to an undated contract, the plaintiff agreed to sell the automobile mentioned in finding 5 to one Kichinosuke Nohara, a Japanese National, for the sum of 3,790,000 yen ($10,500).

7. On July 1, 1953, the plaintiff appeared before the United States Vice Consul in Tokyo, Japan, and executed a bill of sale, which purported to transfer the automobile mentioned in findings 5 and 6 to Kichinosuke Nohara in consideration of $5,500, receipt of which was acknowledged in the same instrument.

8. On July 2, 1953, the plaintiff, in connection with effecting delivery of the automobile mentioned in findings 5–7, which was then at the port in Yokohama, Japan, executed FEC Form 380, entitled "Customs Free Import or Export of Cargo or Customs Declaration of Personal Property." The document was, in turn, signed by the certifying officer and the authenticating officer. The following certificate appeared above the signature of the plaintiff:

> 1. The undersigned certifies that he is a member of the United States Forces or an employee of a Con-

tractor, as defined in Cir. 8, Hq., FEC, 1952. and that the above listed property [1953 Cadillac 4 dr sedan, Model Fleetwood 60S] is imported by me for the personal use of myself (or my dependents) and that such property will not be disposed of to persons or agencies not accorded the benefits of the Administrative Agreement except as authorized by regulations.

2. I further certify that my personal property and personal effects contain no items or commodities prohibited by paragraph 11a, Cir. 8, Hq., FEC. 1952.

9. (a) On December 11, 1953, the plaintiff was tried by a special court-martial convened by the Commanding Officer, Camp Tokyo, Honshu, Japan. He was charged with having violated Article 107 of the Uniform Code of Military Justice, in that he did, on or about July 2, 1953, with intent to deceive, falsely sign an official document (FEC Form 380). He was also charged with having violated Article 92 of the Uniform Code of Military Justice, in that (1) during the month of June 1953, he failed to register his privately owned vehicle with the Provost Marshal, Japan, as required by Paragraph 8 of Letter, Headquarters Far East Command, APO 500, AG 451 (7 June 1952) PM, subject: Inspection and Registration of Privately Owned Vehicles of Members of the United States Armed Forces, Japan, dated 7 June 1952; and (2) on or about 12 July 1953, he transferred his privately owned vehicle to a Japanese National in violation of paragraph 5a, Letter, Headquarters Far East Command, APO 500, AG 400.703 (22 January 1953) EJ/C, subject: Disposition of Personal Property in Japan, dated 22 January 1953.

(b) The plaintiff entered a plea of "not guilty" to all of the charges and specifications referred to in paragraph (a) of this finding.

(c) The plaintiff was found guilty as charged and was sentenced to be confined at hard labor for 6 months and to pay a fine of $2,000.

(d) The sentence was approved by the convening authority on December 28, 1953.

(e) On January 18, 1954, the record of trial was examined in the Office of the Command Staff Judge Advocate and was found to be legally sufficient.

10. Under the date of March 2, 1954, the Civilian Personnel Officer at Headquarters, Central Command, APO 500, Japan, sent to the plaintiff a letter stating in part as follows:

> This is to advise you that it is proposed to suspend you from pay and duty status for a period of thirty (30) calendar days beginning on or about 4 March 1954, pending action to remove you from federal employment for violation of the Uniform Code of Military Justice Article 107 and Article 92.
>
> * * * * *
>
> You have the right to answer this advance notice with respect to proposed suspension in writing, and to submit any and all evidence you may desire within 24 hours from the date of receipt of this notice. * * *

11. Under the date of March 2, 1954, the Civilian Personnel Office at Headquarters, Central Command, APO 500, Japan, sent to the plaintiff another letter stating in part as follows:

> In accordance with section 14 of the Veteran's Preference Act of 1944, this is a notice of proposed adverse action to remove you from employment for violation of the Uniform Code of Military Justice Article 107 and Article 92 on or after 30 days following your receipt of this notice.
>
> * * * * *
>
> You have the right to answer this notice of proposed action in writing and to submit any and all evidence you may desire within ten (10) days from the date of receipt of this notice. * * *

12. In reply to the letters referred to in findings 10 and 11, the plaintiff under the date of March 3, 1954, addressed a letter to the Civilian Personnel Section, Headquarters, Central Command, APO 500. The plaintiff (among other things) asked that he be allowed "to appear before a Civil Service Grievance committee, in accordance with the Veterans Preference Act of 1944."

13. On March 4, 1954, the plaintiff was notified in writing by the appropriate official of the Department of the Army that, effective March 6, 1954, he was suspended from his position as clerk for 30 days "pending removal for violation of the Uniform Code of Military Justice Article 107 and Article 92."

14. The plaintiff's letter of March 3, 1954 (see finding 12) was acknowledged by the Civilian Personnel Officer at Headquarters, Central Command, APO 500, on March 16, 1954. In his communication of that date, the Civilian Personnel Officer stated in part as follows:

> You are advised that your request for a grievance committee hearing * * * cannot be favorably considered inasmuch as this is not a matter that can be resolved by the Grievance Committee. Your conviction and sentence by the Special Court Martial which tried you has been reviewed, as required by law by the Staff Judge Advocate Section, Central Command and has been held to be legally sufficient and free from prejudicial error. Under Article 64c, Uniform Code of Military Justice, this review is a final and conclusive adjudication.
>
> Therefore, after careful consideration of the charges and your reply, decision has been reached to effect your removal for violation of the Uniform Code of Military Justice Article 107 and Article 92 effective on or after thirty (30) days from 2 March 1954, as proposed in letter of advance notice of that date.
>
> You have the right to appeal to the Civil Service Commission under Section 14 of the Veteran's Preference Act within ten (10) days after the effective date of removal. * * *

15. The plaintiff was tried by an Army general court-martial convened at Tokyo, Japan, in June and July of 1954. He was found guilty of various violations of Articles 81 and 92 of the Uniform Code of Military Justice committed during the year 1953, involving prohibited money transactions. Sentence was adjudged on July 8, 1954. The record of trial was forwarded to The Judge Advocate General of the Army for review by a board of review.

16. On October 25, 1954, the plaintiff was notified in writing by the appropriate official of the Department of the Army that, effective August 27, 1954, he was removed from his position as clerk. The notice stated in part as follows:

> Removed for violation of the Uniform Code of Military Justice, Article 107 and Article 92. Subject employee imported a 1953 Cadillac four-door sedan for his own personal use and during the same month transferred it to Kichinosuke Nohara, a Japanese National, which transfer is in violation of current regulations. In final

notice of proposed adverse action, removal, employee was given notice of the right to appeal to the Civil Service Commission under Section 14 of the Veteran's Preference Act.

17. At the time of his removal, as indicated in finding 16, the plaintiff was employed as a clerk, GS–301–5b, and was receiving pay at the rate of $3,535 per anuum.

18. The plaintiff did not take an appeal to the Civil Service Commission from the action of the Department of the Army in removing him from his employment with that Department.

19. (a) A board of review in the Office of The Judge Advocate General of the Army reviewed the action of the general court-martial referred to in finding 15. In a decision dated January 10, 1955, the board set aside and dismissed the findings of guilty as to two specifications, and approved and affirmed the plaintiff's guilt as to specifications charging:

(1) Wrongful and unlawful purchases by the accused of dollar instruments valued at $38,025, a sum in excess of his pay and allowances for the period involved (violation of Article 92, Uniform Code of Military Justice).

(2) Wrongful and unlawful purchases by the accused, in the name of a third person, of two mail transfers in the total amount of $4,000 with funds which were owned by and belonged to the accused (violations of Article 92, Uniform Code of Military Justice).

(3) A conspiracy between the accused and a named enlisted man to violate the clause of the regulation which prohibited the purchase and remission of money, for third parties, through a military financial facility (violation of Article 81, Uniform Code of Military Justice).

(b) The sentence, as modified and approved by the board of review, provided for payment to the United States of a fine of $25,000, confinement at hard labor for 3 years, and further confinement at hard labor until the fine was paid, but for not more than an additional period of 3 years.

20. The United States Court of Military Appeals, in an opinion dated June 8, 1956, affirmed the decision of the board of review mentioned in finding 19.

21. As a consequence of the court-martial proceedings referred to in previous findings, the plaintiff was confined in Army prisons from December 10, 1953, to March 13, 1957.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover the pay lost by reason of being illegally removed from his position. However, the judgment is suspended and the case remanded to the Trial Commissioner for further proceedings relative to a determination of the question of plaintiff's right to employment after expiration of his contract.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 588

LANDON A. JACKSON, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 31–39) is not yet reported.

JURISDICTION

The judgment of the United States Court of Claims was entered on March 17, 1967. A timely petition for rehearing was denied on June 9, 1967. The petition for a writ of certiorari was filed on September 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

278-487—67——1

QUESTIONS PRESENTED

1. Whether petitioners' suit for back pay was barred because they failed to exhaust available administrative remedies.

2. Whether petitioners' suit for back pay, filed over 5½ years after the last administrative action on their discharges, was barred by laches.

STATEMENT

On March 10, 1956, the six petitioners, civilian employees of the Department of the Army in Japan, were convicted, fined and sentenced to a term of imprisonment by general court-martial for violating Army regulations concerning the purchase and disposition of alcoholic beverages and the use of military payment certificates. Their petitions for a grant of review were denied by the Court of Military Appeals on September 11 and November 21, 1956. Accordingly, each petitioner paid his fine and served his sentence, the last being released from confinement in August 1957.

On March 30, and April 5, 1956, petitioners were notified of their proposed removals on grounds essentially the same as the charges against them in the court-martial proceedings. Each petitioner was advised of his right to respond to these charges, and four of them did so. Petitioners were advised of their removals effective May 31 and June 7, 1956. Each was also advised of his right, as a veterans' preference eligible, to process an appeal to the Civil Service Commission within 10 calendar days and all appealed to the Commission.

In letters of September 18 and September 28, 1956, the Commission advised those petitioners whose appeals it had adjudicated that their removals were affirmed.[1] These letters also advised that no further appeal would be considered unless submitted to the Commission's Board of Appeals and Review within seven days. None of the petitioners filed a further appeal.

Between September 28, 1956, the date of the last administrative action on their removals, and May 29, 1962, when they instituted the present suit, petitioners took two actions: (1) On April 12, 1957, they filed a petition with the Judge Advocate General for a retrial on their court-martial convictions; this was denied on November 17, 1960. (2) On January 14, 1960, they filed suit in a federal district court seeking declaratory relief voiding their convictions, return of the fines that had been imposed, and restoration to their positions. On November 21, 1960, the district court entered summary judgment declaring petitioners' court-martial convictions invalid but denying, as beyond the court's jurisdiction, the other relief sought. Petitioners did not appeal the denial of relief for want of jurisdiction, but the United States appealed the judgment invalidating the court-martial convictions, which was affirmed on June 16, 1961.

[1] The appeals of two petitioners were untimely, and the Commission requested further information of them concerning the reasons for their untimely filing, stating that otherwise the appeals would not be accepted. Since one late-filing petitioner did not respond to this request, he was informed on August 23, 1956 that his case was closed for failure to prosecute. The other responded with an explanation, and the Commission adjudicated his appeal.

On March 17, 1967, the Court of Claims entered its decision on cross-motions for summary judgment in the present action. The court concluded that petitioners' claims were barred by failure to exhaust their administrative remedies and by laches.

ARGUMENT

1. The decision below is correct. It has been held repeatedly that an employee who does not complete appeal of his removal by proceedings within the Civil Service Commission may not later challenge the basis of that removal. See *e.g., Hatton* v. *United States,* 173 Ct. Cl. 1187, certiorari denied, 384 U.S. 965; *Blackmar* v. *United States,* 354 F. 2d 340 (Ct. Cl.). In barring a claim against the United States, this Court has reasoned that requiring a claimant to exhaust administrative remedies permits the government to correct errors on the administrative level, and thus to mitigate or avoid large damage claims that might otherwise be created. *United States* v. *Holpuch Co.,* 328 U.S. 234, 239. This Court's reasoning applies to the present case since petitioners failed to present their argument that their removals were procedurally defective (Pet. 19–20), to the Civil Service Commission's Board of Appeals and Review when they had the opportunity to do so more than nine years ago.[2]

[2] *Mallow* v. *United States*, 161 Ct. Cl. 207, relied upon by petitioners, is not in point. There, the court held that plaintiff was not barred by failure to exhaust his administrative remedies, because the government had made it appear that no further administrative remedy was open to him. Here, the government informed the petitioners, in clear terms, of their further available remedies.

2. The Court of Claims was also correct in holding that petitioners' suit, filed over 5½ years after the last administrative action on their discharges, was barred by laches. In *Arant* v. *Lane,* 249 U.S. 367, this Court set forth the persuasive reasons for requiring public employees to exercise diligence in presenting claims for unlawful discharge:

> When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service. [*Id.* at 372.]

Much shorter intervals than the 5½ years' period in this case have been held to bar a delayed suit. *Chappelle* v. *Sharp,* 301 F. 2d 506 (C.A. D.C.), certiorari denied, 370 U.S. 903 (34½ months' delay); *Jones* v. *Summerfield,* 265 F. 2d 124 (C.A. D.C.), certiorari denied, 361 U.S. 841 (33 months' delay); *Bovard* v. *United States,* 160 Ct. Cl. 619, certiorari denied, 374 U.S. 830 (4½ years' delay).

CONCLUSION

For the reason stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.
CARL EARDLEY,
Acting Assistant Attorney General.
ALAN S. ROSENTHAL,
Attorney.

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